



California Fair Political Practices Commission

February 7, 1990

Darrell W. Larsen
Sutter County Counsel
463 Second St.
Yuba City, CA 95991

Re: Your Request for Informal Assistance
Our File No. I-89-555

Dear Mr. Larsen:

This is in response to your request on behalf of Sutter County Supervisor Barbara LeVake regarding her responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act")¹. Since your request does not refer to a specific governmental decision, we are treating your request as one for informal assistance pursuant to Regulation 18329(c) (copy enclosed).²

QUESTION

Can Supervisor LeVake participate in decisions before the board of supervisors which affect farmers who do business with her husband's employer.

CONCLUSION

Supervisor LeVake may not participate in decisions before the board of supervisors which affect farmers who, because of the volume of business they do with her husband's employer, cause her husband to receive a bonus from the employer.

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

FACTS

Supervisor LeVake's spouse is employed in Sutter County by an agricultural products processing company with locations throughout California. Her spouse receives compensation in the form of salary, and also in the form of bonus payments based on the volume of produce processed by the plant which he manages. Based on information provided in telephone conversations clarifying the financial relationship between the spouse and the employer, you have stated that Supervisor LeVake's spouse has no ownership interest in the processing company, and receives income and bonus payments only from the company, not from any of the farmers. The bonus payments made to the spouse are automatically paid based on production levels, and are sometimes tied to produce purchased from these Sutter County farmers.

The produce processed is purchased by the spouse's employer from numerous growers across California, including approximately 80 Sutter County farmers. It may be assumed that the bonus payments received by the supervisor's spouse from the employer in the last year exceed \$500 per Sutter County farmer doing business with the employer, and that her spouse knows which Sutter County farmers are, in fact, responsible for those bonuses. Some of these farmers appear before the board of supervisors seeking various approvals, including land use approvals.

ANALYSIS

Section 87100 prohibits a public official from making, participating in, or using her official position to influence any governmental decision in which she knows or has reason to know she has a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or any member of her immediate family, or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103 (a)-(e).

Supervisor LeVake has no investment interest in the processing company and she is not an officer or employee of the company. While she does not received income directly from the company, Section 82030 defines "income" to include the community property interest in the income of a spouse.

Supervisor LeVake has a community property interest in the income her spouse receives from his employer. The bonuses received by her spouse from his employer are also income in which the supervisor has an interest. Thus, Supervisor LeVake's spouse's employer is a source of income to her. Consequently, she may not participate in any decision which will have a reasonably foreseeable material financial effect, distinguishable from its effect on the public generally, on her spouse's employer. However, based on the facts you have provided, the decisions in question will have no foreseeable financial effect on the processing company. The question here is whether the farmers who do business with the company are sources of income to Supervisor LeVake, as well.

Source of Income

The Commission has provided guidance in the past regarding sources of income in multi-party economic relationships. Each case presented a unique set of circumstances. The Commission's opinion, In re Carey (1977) 3 FPPC Ops. 99 (copy enclosed) involved a real estate brokerage firm's commissions on sales of real property. You have described Supervisor LeVake's spouse's bonus payments as commission income, as well. The have stated that the bonus payments are not discretionary, but are, in a sense, owed to the spouse. The holding in Carey, therefore, is helpful in our analysis.

One of the questions posed in Carey was whether the public official/owner of the firm was required to report all of the firm's commission income as "income" pursuant to the reporting requirements of the Act. The Commission held that the real estate commission fees which were "owed" to the sales agents should be excluded from income to the public official because "the payment to the salesperson is inseparable from the transaction that produces it." (Carey, supra, at page 102.)

In the present case, the bonuses which are paid to the supervisor's spouse are based on the amount of produce processed by the plant which he manages. The bonus payment is made to the

spouse automatically, as in the case of a real estate commission automatically paid to an agent. Thus, the automatic bonus which is "owed" to the spouse for the volume of production is similar to the commission arrangement discussed in Carey.

Further, you have been able to provide to us figures which demonstrate that it is possible to identify the amount of the bonus payment attributable to each Sutter County farmer doing business with the employer. This indicates that Supervisor LeVake's spouse knows which Sutter County farmers are responsible for the bonuses provided to him by his employer. Moreover, absent contrary information, these farmers appear to have control over whether or not the spouse receives the bonus income attributable to their produce. The farmers could choose to do just enough business with the processor to eliminate the bonus, or in the alternative, could increase their business with the processor to significantly enhance the bonuses received by the spouse.

We conclude, therefore, that the farmers in question have sufficient control over the income received by the spouse to constitute sources of income to him. Thus, Supervisor LeVake must disqualify herself from any governmental decisions which would foreseeably have a material financial effect on a farmer whose produce generates a bonus to her husband of \$500 or more.

Material Financial Effect

Regulation 18702.1 (copy enclosed) provides that the effect of a decision is material if the following applies:

(a)(1) Source of Income or Gifts - Any person (including a business entity) which has been a source of income (including gifts) to the official of \$250 or more in the preceding 12 months is directly involved in a decision before the official's agency....

* * * * *

(b) A person or business entity is directly involved in a decision before an official's agency when that person or entity, either personally or by an agent:

(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal or similar request or;

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency.

(3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.

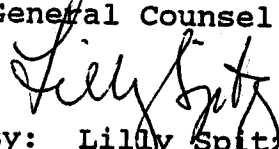
(Regulation 18702.1(a)(1) and (b).)

The farmers who appear before the board of supervisors as applicants seeking various approvals are directly affected by the decisions of that body. (Regulation 18702.1(b).) Thus, the effect of the decisions on these farmers is material. (Regulation 18702.1(a)(1).) Consequently, Supervisor LeVake must disqualify herself from decisions regarding land use and other approvals brought before the board of supervisors by the farmers who are sources of income to her.

I trust this analysis answers your question. If you would like further clarification, please contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel


By: Lilly Spitz
Counsel, Legal Division

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